U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

April 28, 2017

BY ECF

The Honorable Richard M. Berman
United States District Judge
Southern District of New York
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, New York 10007

Re: United States v. Elvin Heskey, 15 Cr. 228 (RMB)

Dear Judge Berman:

The Government respectfully submits this supplemental sentencing submission in response to the defendant's April 17, 2017 supplemental submission, and in further support of its October 13, 2016 sentencing submission. The Government respectfully submits that a sentence within the Guidelines range of the 151 to 188 months' imprisonment would be sufficient but not greater than necessary to promote the legitimate purposes of sentencing.

I. The Defendant's Arguments Do Not Merit a Below-Guidelines Sentence

The defendant makes several additional arguments in support of his request for a non-Guidelines sentence, but none of those arguments justify the substantial reduction in sentence he seeks.

The defendant principally argues that the Court should "question the flawed 2G2.2 Guideline" and instead "use its sentencing authority under the § 3553(a)(1) factors to effectively lower the Guidelines range." (Def Mem. 2, 11). As the Court is well aware, post-*Booker*, the Guidelines are no longer mandatory but nonetheless "continue to guide district courts in exercising their discretion by serving as 'the framework for sentencing.'" *Beckles* v. *United States*, 137 S. Ct. 886, 894 (2017) (internal citation omitted). This is undoubtedly also true for child pornography offenses like the instant case. *Hobson* v. *United States*, 590 F. App'x 32, 33 (2d Cir. 2014) ("Equally meritless is [the defendant's] contention that the Guidelines' treatment of child pornography offenses is irrational and therefore requires special consideration of mitigating factors. The Guidelines commentary acknowledges the limitations to which [the defendant] objects and suggests that a departure may be warranted in some circumstances."). Quite simply, the nature and circumstances of this defendant and this case stand apart from many of the cases cited by defense counsel, and do not merit a below-Guidelines sentence.

The defense next makes several fact-specific arguments related to the way in which the defendant sought out, downloaded, and made available for download child pornography, in support of his argument for a below-Guidelines sentence. However, the way in which the defendant committed the instant offense — in conjunction with his history and characteristics — do not merit a substantial downward variance. The defendant first argues that the nature of peer-to-peer ("P2P") file sharing networks explains the enormous quantity of files the defendant possessed and also the organization of those files on his external hard drive. It is certainly accurate that torrent files can sometimes contain thousands of files organized into subfolders.[1] Yet several facts unique to the instant case are worth noting. First, the defendant downloaded — and made available for download — thousands of files of child pornography for a five-month period. He did not merely download one torrent file and save it to his own personal collection. He continued engaging in the distribution and receipt of child pornography for months, and amassed a considerable collection. The defendant also utilized an external hard drive to store and collect his child pornography. To accomplish this, the defendant either (i) modified the user settings of Tixati to direct the download go to his external hard drive, rather than his laptop download folder; or (ii) he moved the files from the laptop download folder to the external hard drive for storage.

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[1] By way of background, P2P file-sharing is a method of communication available to Internet users through the use of special software. Computers linked together through the Internet using this software form a network that allows for the sharing of digital files between users on the network. A user first obtains the P2P software (such as the "Tixati" program, used by the defendant here), which can be downloaded from the Internet. In general, P2P software allows the user to set up file(s) on a computer to be shared with others running compatible P2P software. Bittorrent, one type of P2P software, sets up its searches by keywords, typically on torrent websites. Bittorrent programs are typically free to download and used for the exchange of files between computer users.

To search for a particular torrent file, a user would first navigate to a torrent website, and download a torrent. The results of a keyword search are displayed to the user. The website does not contain the files being shared, instead it contains only file referred to as a "torrent." The user then selects one or more .torrent file(s) from the results for download. This .torrent file contains instructions on how a user can download the file(s) referenced in the torrent within the P2P softward. The download of a file is achieved through a direct connection between the computer requesting the file and the computer(s) sharing the actual files (not the torrent file but the actual files referenced in the .torrent file using any Bittorrent client).

For example, a person interested in obtaining child pornographic images would open the Bittorrent website on his computer and conduct a keyword search for files using a term such as "preteen sex." The results of the search would then be returned to the user's computer and displayed on the torrent site. The user then selects a .torrent from the results displayed for the file(s) he wants to download. Once the .torrent file is downloaded, it is used by a Bittorrent program (like Tixati), which the user had previously installed. The .torrent file is the set of instructions the program needs to find the files referenced in the .torrent file. The file or files are then downloaded directly from the computer or computers sharing the file(s). The downloaded file or files are stored in the area previously designated by the user and/or the software. The downloaded file(s) will remain until moved or deleted.

As a result of the defendant's use of an external hard drive to store his child pornography collection, the FBI's forensic analysis could not determine whether the file organization and structure on that hard drive was created by the defendant, or preexisting in the torrent files he downloaded. The FBI could determine, however, that the defendant not only kept his files organized within that structure (assuming *arguendo* that he did not create it himself), but also that he had recently reviewed certain of the folders on the hard drive, including folders containing child pornography of infants and toddlers.[2]

In addition, the defendant points to a forensic examination of his Google search history in support of his contention that he did not seek out certain graphic imagery, including that of young toddlers. The defendant's Google search history reveals that he searched for terms such as "bestiality" and "preteen cameltoe" in February and March 2015. However, the FBI was unable to recover the search terms the defendant used in torrent websites to locate and download child pornography. As a result, there is no evidence that the defendant did not seek out, through the use of search terms, certain of the most graphic imagery; instead, the evidence merely shows that he did not use Google to do so.

Yet what truly separates Heskey from the defendants in *Jenkins* and *Dorvee* is the defendant's criminal history, and the fact that he engaged in the instant offense only weeks upon being released from a lengthy term of imprisonment for a violent assault. Indeed, in finding a 225-month sentence "shockingly high," the *Jenkins* court relied heavily on the low risk of recidivism for a first-time offender with a low criminal history range like Jenkins, citing to the United States Sentencing Commission's Recidivism Report. Heskey, by contrast, has five criminal history points and, according to that same Recidivism Report, poses a significantly higher risk of recidivism. *See United States* v. *Jenkins*, No. 14-4295-CR, 2017 WL 1371399, at *6 (2d Cir. Apr. 17, 2017) (citing http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170309_Recidivism-CH.pdf).

[2] The FBI's forensic analysis was unable to determine whether and when the defendant accessed and viewed each individual file on the external hard drive. rather, the FBI was able to determine which folders the defendant accessed most recently.

For the reasons set forth above and in the Government's October 13, 2016 sentencing submission, a sentence within the applicable Guidelines range of 151 to 188 months is appropriate given the nature and circumstances of the offense and the history and characteristics of the defendant.

Respectfully submitted,

JOON H. KIM
Acting United States Attorney

By:________/s/______________________
Rebekah Donaleski
Assistant United States Attorney
(212) 637-2423

cc: Jason Ser, Esq.